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No. 1137

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMERICAN FLYERS AIRLINE CORPORATION, *Petitioner,*

v.

GEORGE E. FARRELL, ETC., ET AL., *Respondents.*

AMERICAN FLYERS AIRLINE CORPORATION, *Petitioner,*

v.

HON. JOHN F. X. McGOHEY, Judge of the United States District Court for the Southern District of New York, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

AMERICAN FLYERS AIRLINE CORPORATION, *Petitioner*

v.

GEORGE E. FARRELL, as Administrator of the Estate of RALPH D. JOHNSON, deceased, and GENEVIEVE SANTANA, individually and as Administratrix of the Estate of VICTOR SANTANA, deceased, and JOHN GUGLIUZZA, individually and as Natural Guardian of RONALD GUGLIUZZA, an infant over the age of fourteen years, and MARGARET MANNING, individually and as next friend and guardian of the Person and Estate of SAMUEL DON MANNING, a minor, and WILLIAM KAY MILLER, as Temporary Guardian of the Estate of DAVID THOMAS, a minor, and ROSALIO TOBIAS, JR., and IRENE COMMUNE, individually and as Administratrix of the Estate of ROBERT E. COMMUNE, deceased, and LORENZO GOMEZ, individually and as Temporary Administrator of the Estate of LUIS A. GOMEZ, deceased, and LORRAINE M. THOMAS, individually and as Administratrix of the Estate of DENNIS WISSELL, deceased, and JACK PASTER, individually and as Administrator of the Estate of RICHARD PASTER, deceased, *Respondents*

AMERICAN FLYERS AIRLINE CORPORATION, *Petitioner*

v.

WILLIAM P. KENNELLY and DOROTHY KENNELLY, as Administrators of the Goods, Chattels and Credits of WILLIAM T. KENNELLY, deceased,

Respondents

AMERICAN FLYERS AIRLINE CORPORATION, *Petitioner*

v.

DOROTHY WILLS, as Administratrix of the Goods, Chattels and Credits of LEMUEL WILLS, JR., deceased, *Respondent*

AMERICAN FLYERS AIRLINE CORPORATION, *Petitioner*

v.

HON. JOHN F. X. McGOHEY, Judge of the United States District Court for the Southern District of New York, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner American Flyers Airline Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled cause on November 22, 1967.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (App. B, *infra*, pp. 1a-7a) is reported at 42 F.R.D. 341. The opinion of the United States Court of Appeals for the Second Circuit (App. C, *infra*, pp. 8a-12a) is reported at 385 F.2d 936.

JURISDICTION

The order of the court of appeals denying the petition for a writ of mandamus (App. D, *infra,* p. 13a) was entered on November 22, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a Writ of Mandamus should issue to overrule a trial court's denial of transfer, challenged for abuse of discretion, in a case where sound judicial administration requires the transfer in order to prevent an extravagantly wasteful duplication of the time and effort of federal courts by the trial of two protracted cases involving the same factual issues.

STATUTES INVOLVED

The statutory provisions involved are the All Writs Act, 28 U.S.C. § 1651(a), and 28 U.S.C. § 1404(a) (App. A. *infra,* p. 1a)

STATEMENT

These actions join twelve claims for wrongful death or personal injury arising out of the crash of petitioner's Lockheed Electra aircraft near Ardmore, Oklahoma, in which crash eighty-three persons were killed and fifteen injured. The facts are briefly as follows.

Petitioner American Flyers Airline Corporation (hereafter AFA) is a certificated Supplemental Air Carrier authorized by the Civil Aeronautics Board to engage in supplemental air transportation, or charter flying (R. Vol. 2, p. 67). Since its incorporation under the laws of the State of Texas in 1949, petitioner has

been engaged in flying charter flights for both civilian groups and the military. AFA is a small airline, employing a total of 265 persons and owning and operating ten aircraft. Its principal place of business is Fort Worth, Texas, but petitioner leases a hangar and one administration building at the Ardmore Municipal Airport in Ardmore, Oklahoma—located approximately 100 miles north of Fort Worth within the judicial district for the Eastern District of Oklahoma—where petitioner's flight, operations and maintenance departments are located. The records of these departments are also located in Ardmore. Petitioner flies no scheduled routes in the United States, flying instead to any state designated in a charter and to certain places overseas. Petitioner therefore does business in a very considerable number of states in the United States. Petitioner is doing business in the Eastern District of Oklahoma, is licensed to do business throughout the State of Oklahoma, and has an agent for service of process in that State (R., Vol. 2, pp. 67-68).

On April 22, 1966, petitioner's Lockheed Electra aircraft Registration N183H departed Monterey, California on a military charter flight known as a "CAM," or Civil Air Movement. On board the aircraft were 92 soldiers from Fort Ord, California, bound for Fort Benning, Georgia. Also on board were six of petitioner's employees, five of whom made up the crew of the aircraft. These included Captain Reed W. Pigman, petitioner's president, director, general manager and principal shareholder. The flight—CAM 280D—was to terminate at Columbus, Georgia, with an en route stop scheduled at Ardmore for refueling and a crew change. At approximately 8:30 p.m. CST the aircraft crashed into the foothills near the Ardmore

airport. All six of defendant's employees, including Captain Pigman, and 77 of the 92 passengers were killed; fifteen of the passengers survived.

The 92 passengers—recent inductees into the United States Army—were residents of many locales. They and their surviving beneficiaries were residents of 25 states, Puerto Rico and Czechoslovakia (R., Vol. 2, pp. 68, 80-85). The Civil Aeronautics Board held public hearings to determine the probable cause of the crash at Ardmore, Oklahoma, from May 25 through 27, 1966. At these hearings there was testimony to the effect that (1) upon autopsy it was discovered that Mr. Pigman had coronary artery arteriosclerosis, and (2) there was considerable thunderstorm activity in the area at the time of the crash. By September 20, 1966, nine actions arising out of this crash had been filed against AFA and were pending in federal courts located in six judicial districts. Of these first nine cases one was pending in the United States District Court for the Southern District of New York, one in the Eastern District of New York, two in the Northern District of Illinois, two in the Northern District of Oklahoma, two in the District of South Carolina, and one in the Eastern District of Oklahoma (R., Vol. 2, p. 69). In each of these cases the plaintiffs alleged that negligence of petitioner in the ownership, operation and maintenance of its aircraft proximately caused the crash, and compensatory damages were sought. In addition, some of the complaints alleged that the crash was caused because Captain Reed Pigman had suffered a heart attack and became incapacitated in flight, and that petitioner was either negligent or grossly negligent because it knew of his physical condition. These complaints sought punitive, as well as compensatory damages (R., Vol. 2, p. 72).

On or about September 20, 1966, petitioner filed an identical motion to transfer in eight of these cases requesting the district courts concerned to transfer each case to the Eastern District of Oklahoma, the judicial district in which the accident occurred, where petitioner's operational and maintenance employees and records were located, and where the great majority of witnesses on the issue of liability resided. Petitioner stated that if these transfers were effected it would move the Oklahoma court to consolidate all cases for a single trial on the issue of liability. The first courts to rule on these transfer motions were the United States District Courts for the Eastern and Southern Districts of New York. See *Scaramuzzo* v. *American Flyers Airline Corp.*, 260 F. Supp. 746 (E.D.N.Y. 1966); *Schmidt* v. *American Flyers Airline Corp.*, 260 F. Supp. 813 (S.D.N.Y. 1966). These courts denied the motions on the grounds, *inter alia*, that transfer would work a hardship on the plaintiffs—who were residents of New York—and that a single consolidated trial in Oklahoma was "a fanciful hope of the defendant" since only one case was pending in the proposed transferee district. 260 F. Supp. 816. The *Scaramuzzo* and *Schmidt* cases were later settled and dismissed with prejudice (R., Vol. 2, p. 9).

Following these rulings in New York petitioner filed supplemental affidavits in the remaining cases stating that if its motions to transfer were granted on the condition that AFA "pay the travel costs of plaintiffs, their witnesses and counsel for trial in the Eastern District of Oklahoma," petitioner would agree to that condition. Thereafter, five United States District Judges entered such conditional orders and transferred a total of ten cases from four judicial districts—

the Northern District of Illinois, the District of South Carolina, and the Northern and Central Districts of California—to the Eastern District of Oklahoma for trial (R., Vol. 2, pp. 104-14, 151-54). See *Wright* v. *American Flyers Airline Corp.*, 263 F. Supp. 865 (D.S.C. 1967); unreported opinion of Judge Will in *Lara* v. *American Flyers Airline Corp.* (N.D. Ill. 1966) printed at R., Vol. 2, pp. 104-06. In all but one of these ten transferred cases the plaintiffs were residents of the states in which their actions had been filed.

Following the publication of the decisions denying transfer in the *Schmidt* and *Scaramuzzo* cases, sixteen additional cases arising out of this crash were filed in or removed to the Southern District of New York.[1] In only five of these sixteen cases were the plaintiffs residents of New York. In the other eleven they were citizens of Texas, California, Alabama, Tennessee, Vermont, Connecticut and New Jersey (R., Vol. 2, pp. 16-17, 46, 60, 115-17). Petitioner moved for consolidation of these sixteen actions and for their transfer to the Eastern District of Oklahoma, stating again that it would agree to a condition in the transfer order that AFA pay the above-mentioned costs of plaintiffs, whether residents or nonresidents. Petitioner's motion

[1] *Farrell et al.* v. *AFA*, Index No. 67 Civ. 183, and *McGuigan et al.* v. *AFA*, Index No. 67 Civ. 1630, were filed in the Supreme Court of the State of New York, County of New York, and removed by petitioner to the Southern District of New York pursuant to 28 U.S.C. § 1441(c) (R., Vol. 2, pp. 14-36, 49-58). *Kennelly* v. *AFA*, Index No. 67 Civ. 302, and *Davidson* v. *AFA*, Index No. 67 Civ. 1772, were filed in the Supreme Court of the State of New York, County of New York, and removed by petitioner to the Southern District of New York pursuant to 28 U.S.C. § 1441(a). (R., Vol. 2, pp. 41-45, 59-64). *Wills* v. *AFA*, Index No. 67 Civ. 1562, was filed in the Southern District of New York pursuant to 28 U.S.C. § 1332 (R., Vol. 2, pp. 46-48). On December 1, 1967, Index Nos. 67 Civ. 1630 (*McGuigan*) and 67 Civ. 1772 (*Davidson*) were settled and dismissed with prejudice.

came on for hearing before respondent, Hon. John F. X. McGohey, who filed an opinion on June 16, 1967, in which he granted consolidation for a single trial on the issue of liability, and denied transfer in all cases (R., Vol. 2, pp. 4-14). As of the date of respondents opinion the overall status of this litigation was as follows: Thirty actions for wrongful death or personal injury were pending in federal courts located in six judicial districts—sixteen in the Southern District of New York; one in the Eastern District of New York; two in the Northern District of California; one in the Central District of California; one in the Eastern District of Arkansas; and nine in the proposed transferee district (R., Vol 1, p. 15). The total damages sought from AFA in these thiry actions was $15,153,750, of which $4,950,000 was sought as punitive damages (R., Vol. 1, p. 15). Motions to transfer to the Eastern District of Oklahoma had been filed in all of the actions then pending in federal courts outside the proposed transferee district. in each of which petitioner had indicated its willingness to pay the above-stated costs.

On September 27, 1967, petitioner filed a petition for a writ of mandamus in the United States Court of Appeals for the Second Circuit asking that court to direct respondent to vacate that portion of his orders denying transfer. Petitioner argued to the court of appeals that sound judicial administration required that these sixteen cases be promptly transferred to Oklahoma in order to prevent an extravagantly wasteful and useless duplication of the time and effort of federal courts, witnesses and litigants by the trial of two protracted cases involving the same factual issues. AFA's petition for a writ of mandamus was denied by the court of appeals on November 22, 1967 (R., Vol. 3, p. 16).

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Ruling on Whether and When the Writ of Mandamus Can Be Used To Review a Trial Court's Disposition of a Transfer Motion Challenged for Abuse of Discretion Is in Hopeless Conflict With the Rulings of the Other Circuits on This Important Question.

Petitioner here filed in the United States Court of Appeals for the Second Circuit a petition for a writ of mandamus seeking reversal of respondent's order denying transfer of sixteen cases arising out of an aviation disaster from New York to Oklahoma, the place of the crash. The petition challenged respondent's order as an abuse of discretion.[2] It did not allege that respondent had considered improper factors or usurped judicial power in ruling on the motion to transfer. The gravamen of the petition was that respondent had reached the wrong result after consideration of proper factors.

Some thirteen months prior to the filing of this petition for a writ of mandamus the Second Circuit specifically held for the first time that mandamus, rather than review by interlocutory appeal under 28 U.S.C. § 1292(b), was "the proper procedure to seek review of a trial court's disposition of a § 1404(a) motion, challenged for abuse of discretion." *A. Olinick & Sons* v. *Dempster Bros., Inc.*, 365 F.2d 439 (2d Cir. 1966); *Golconda Mining Corp.* v. *Herlands*, 365 F.2d 856, 857 (2d Cir. 1966). In *Olinick*, as here, it

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[2] The Petition for a Writ of Mandamus alleged:

> The district court's failure to consider certain proper factors when deciding the motions to transfer the actions, and its clearly erroneous evaluation of proper factors, resulted in orders which constituted a clear-cut abuse of discretion (R., Vol. 1, p. 20).

was contended "that the District Court considered proper factors . . . but reached the wrong result." 365 F.2d at 442. In such a case, the court of appeals said, Section 1292(b) was not available as a means of review. However, the court found that it had power to issue mandamus in such a situation if it was shown that the trial court's disposition of the transfer motion was a "clear-cut abuse of discretion." The Second Circuit said:

> . . . The Courts of Appeals understandably wish to reserve power to redress clear-cut abuses of discretion in the handling of § 1404(a) motions, since such abuses cause great inconvenience and expense to the litigants and are almost impossible to correct by review after trial. 365 F.2d at 444.

Judge Friendly wrote a concurring opinion in *Olinick* in which he stated that the writ should be denied because "the petitioner seeks relief beyond our power to grant." 365 F.2d at 448. In his view the courts of appeals had power to issue the writ only "when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power." 365 F.2d at 446 (citing *DeBeers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945)).

In ruling on the petition for a writ of mandamus in the present case the Second Circuit withdrew from the position it had taken earlier in *Olinick*, and adopted Judge Friendly's view. It stated that mandamus could be used only when the district court had usurped its power, and because there was no allegation of that here it refused to "consider the pros and cons" to determine whether respondent had abused his discretion in disposing of the transfer motion. "The test,"

the court of appeals said, was whether the case was a "really extraordinary cause." 385 F.2d at 836. Finding this to be only an ordinary, run-of-the-mill aviation disaster case, the court denied the petition.

A review of the cases in the various circuits on the question of whether and when the writ will issue to control an abuse of discretion by the trial court in ruling on a transfer motion shows the courts of appeals to be in hopeless conflict. The First and Ninth Circuits, like the Second, are extremely restrictive in their use of the writ in this instance. See *In re Josephson,* 218 F.2d 174 (1st Cir. 1954) (holding that a trial court's order denying transfer is *never* reviewable on mandamus since such review cannot aid the jurisdiction of the court of appeals); *Gulf Research & Dev. Co.* v. *Harrison,* 185 F.2d 457 (9th Cir. 1950), *aff'd by an equally divided court,* 344 U.S. 861 (1952) (holding that the writ will issue only in "extraordinary circumstances"). The Eighth Circuit recently reversed itself on this question and held that mandamus was available to cure "manifest judicial arbitrariness." *McGraw-Edison Co.* v. *Van Pelt,* 350 F.2d 361 (8th Cir. 1965), *overruling Great Northern Ry. Co.* v. *Hyde,* 238 F.2d 852 (8th Cir. 1956), *cert. denied,* 355 U.S. 872 (1957).

The Third, Fourth, Fifth, Sixth, Seventh, Tenth and District of Columbia Circuits all take a more liberal view of the use of the writ, and will issue it when a review of the record indicates that the trial court abused its discretion in disposing of the transfer motion. See *Rapp* v. *Van Dusen,* 350 F.2d 806 (3d Cir. 1965); *General Tire & Rubber Co.* v. *Watkins,* 373 F.2d 361 (4th Cir.), *cert. denied,* 87 S. Ct. 1031 (1967); *ACF Industries, Inc.* v. *Guinn,* 384 F.2d 15 (5th Cir. 1967);

Gorenson v. *Kloeb,* 308 F.2d 655 (6th Cir. 1962) (writ will issue for "clear abuse of discretion"); *Chicago, R.I. & P. R. Co.* v. *Igoe,* 220 F.2d 299 (7th Cir.), *cert. denied,* 350 U.S. 822 (1955) (writ issued upon a finding of abuse of discretion); *Cessna Aircraft Co.* v. *Brown,* 348 F.2d 689 (10th Cir. 1965) (writ issued where "sound judicial administration" required overruling of trial court's transfer order); *Illinois Scientific Devs., Inc.* v. *Sirica,* —— F.2d —— (D.C. Cir.), No. 21,349 (Jan. 10, 1968) (court of appeals reviewed record to determine whether trial court "abused his discretion" in ordering transfer)

The most striking example of a view exactly opposite to the rule promulgated by the Second Circuit in this case is found in *General Tire & Rubber Co,* v. *Watkins, supra,* a Fourth Circuit case. In that case General Tire and Rubber Company filed two suits against Goodyear and United States Rubber Company in the Northern District of Ohio alleging patent infringement. Subsequently, Firestone Tire and Rubber Company filed suit in the District of Maryland seeking a declaratory judgment of noninfringement of the same patent. During the course of the Maryland litigation General Tire made three different motions to have that action transferred to Ohio, where it could be consolidated with the two Ohio actions for trial. This motion was denied all three times by the Maryland district court. General Tire sought a writ of mandamus from the Fourth Circuit after its second transfer motion was denied, but that Court declined to issue the writ. *General Tire & Rubber Co.* v. *Watkins,* 326 F.2d 926 (4th Cir. 1964). Following denial of the third motion by the Maryland district court General Tire again petitioned the Fourth Circuit for a writ of mandamus.

This time the Court, sitting en banc, issued the writ. The Court said:

> We are unanimously of the opinion that the case should be transferred to the Northern District of Ohio in order to prevent an extravagantly wasteful and useless duplication of the time and effort of the federal courts by the simultaneous trial of two complex and elaborate cases involving substantially the same factual issues.
>
> * * *
>
> . . . We think La Buy v. Howes Leather Co., 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1956), has clearly settled the question of this court's jurisdiction to entertain a petition under the All Writs Statute and to issue the writ under extraordinary circumstances.
>
> * * *
>
> We turn now to our reasons for issuing the writ under the extraordinary circumstances of this case. *We think the district court erred in its failure to weigh the impelling need for efficiency in the administration of our court system against the right of Firestone to continue the trial in a forum which no longer offered to it any convenience over the Ohio forum. Certainly the simultaneous trial of two suits in different circuits involving a number of identical questions of fact and law would result in a useless waste of judicial time and energy.*
>
> * * *
>
> . . . [T]he principle to be applied is . . . maintenance of judicial economy. The prompt transfer of the Maryland suit to Ohio will make it available there for consolidation and trial in March with the suit against U. S. Rubber. In view of the complex and time consuming nature of patent cases, the advisability of consolidation is obvious.
>
> * * *

> . . . [W]e think the district court abused its discretion in not transferring the Maryland case to Ohio where it will be available for consolidation —the only way in which time and effort can now be saved.
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> * * *
>
> . . . The evidence indicates a high degree of forum shopping which we recognize as an inevitable adjunct to the congressional policy on declaratory judgment suits in patent litigation, *but forum shopping must not be indulged in the face of multiple litigation especially where, as here, the shopper is offered an equally convenient forum.*
>
> * * *
>
> . . . [*O*]*ur interest is with effective administration and supervision of the courts of our circuit.* It is obvious that if we postpone action until appeal after final judgment, the question will have become moot and the damage done.
>
> * * *
>
> We are not here permitting use of mandamus as a substitute for interlocutory appeal, which is, with a few statutory exceptions, prohibited in the federal courts. See 28 U.S.C. §§ 1291-92. Rather, we are using the writ for a purpose for which we think it was intended—*to correct a wrong to the court which otherwise can never be effectively presented on appeal.* The order of the district court is reversed; the writ will be issued. 373 F.2d at pp. 362-3, 368-370 (emphasis added).

In *ACF Industries, Inc.* v. *Guinn, supra,* the Fifth Circuit took a similar view in a case involving a stay order which had been granted for the same reasons that motivate transfer under § 1404(a). In *Guinn* the Fifth Circuit said:

> A mandamus should be issued by an appellate court "in the exceptional case where there is a

clear abuse of discretion or 'usurpation of judicial power.'" Bankers Life and Casualty Co. v. Holland, 1953, 346 U.S. 379, 383, 74 S.Ct. 145, 148, 98 L.Ed.106; La Buy v. Howes Leather Co., 1957, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290. Our primary concern, therefore, is to determine whether *vel non* Judge Guinn abused his discretion in setting aside the order staying the Texas proceedings pending the outcome of the Kansas action. We hold that he did and grant the writ.

* * *

Writs of mandamus may be issued if a judge abuses his discretion. . . . *In determining if a judge abused his discretion, we must look to the correctness of his decision and the reason for it.* 384 F.2d 18, 20 (emphasis added).

In *Rapp* v. *Van Dusen, supra,* the Third Circuit, sitting en banc, recently pointed up a distinction between "cases where the relief sought is directed against the judge individually on grounds extrinsic to the merits of his decision . . . [and] those in which the relief sought is a determination that the decision was intrinsically erroneous." The latter is exemplified, the court said, by petitions seeking a writ of mandamus to review a trial court's transfer ruling. After reviewing the historical development of the writ the Third Circuit said:

In the United States the use of mandamus has continually expanded. . . . *Its modern use has been extended to include cases of clear abuse of discretion, as well as the "supervisory control of the District Courts by the Courts of Appeal [which] is necessary to proper judicial administration in the federal system."* [citing *La Buy* v. *Howes Leather Co.,* 352 U.S. 249 (1947).] Under this principle it has served increasingly to afford relief from the hardships of the final judgment rule

> by permitting review of extraordinary interlocutory orders, *such as orders of transfer* under 28 U.S.C. § 1404(a). 350 F.2d at 812 (emphasis added).

The Third Circuit then modified its procedures so that judges below would be deemed nominal parties only where the purpose of mandamus was to secure interlocutory review of the intrinsic merits of a transfer ruling. Compare Rule 21 of the new Federal Rules of Appellate Procedure (effective July 1, 1968).

As can be seen by a review of the cases, the courts of appeals are in hopeless conflict on whether and when the writ of mandamus can be used to review a trial court's disposition of a transfer motion challenged for abuse of discretion. Because Section 1404(a) is one of the most extensively used sections of the judicial code,[3] it is of the utmost importance to the federal court system that this conflict be resolved by this Court, which holds the prime responsibility for the proper functioning of the federal judiciary. The writ of certiorari should be granted in this case so that this Court can review this important question and bring harmony to this area.

II. The Second Circuit's Ruling That Mandamus Can Issue Only Where There Has Been Usurpation of Judicial Power, and Will Not Issue for Abuse of Discretion, Is in Direct Conflict With Applicable Decisions of This Court.

In this case the court of appeals ruled that the All Writs Statute could be used "only 'when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power.' "

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[3] See Kaufman, *Observations on Transfers Under Section 1404(a) of the New Judicial Code*, 10 F.R.D. 595 (1951).

385 F.2d at 937. The court of appeals refused to pass on petitioner's allegation that respondent's denial of transfer amounted to an abuse of discretion in the circumstances of this litigation. As for abuse of discretion, the court of appeals said only that this "inherently ambiguous" phrase was the cause of all the difficulty in this area, and dismissed it as no more than "a gloss upon the 'really extraordinary causes' ruling" of earlier opinions. 385 F.2d at 938. In reaching this conclusion the court of appeals relied upon footnote 6 of this Court's recent opinion in *Will* v. *United States,* 389 U.S. 90 (1967).

Petitioner submits that this Court's decisions have consistently stated that there are *two* circumstances where the use of the writ of mandamus is appropriate —where there is a usurpation of judicial power *or* where there is a clear abuse of discretion. There is nothing in this Court's opinion in *Will* v. *United States, supra,* to the contrary. The Second Circuit was not warranted in dismissing the second of these two circumstances, and it was error to refuse to pass on petitioner's allegation that respondent here abused his discretion in denying transfer of these cases.

As early as 1953 this Court stated in *Bankers Life & Cas. Co.* v. *Holland,* 346 U.S. 379 (1953) that, "The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is *clear abuse of discretion or* 'usurpation of judicial power' of the sort held to justify the writ in DeBeers Consol. Mines v. United States, 325 U.S. 212 (1945)." 346 U.S. at 383 (emphasis added). Again in 1964, in *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964), this Court

said, "The writ is appropriately used, however, when there is 'usurpation of judicial power' *or a clear abuse of discretion. Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. at 383." 379 U.S. at 110 (emphasis added).

In the present case the Second Circuit plainly ignored the disjunctive in the statements of this Court set forth above, and accepted the view stated in Judge Friendly's concurring opinion in *Olinick, supra,* that the writ could be used only in "usurpation of power" cases. In so doing they relied upon this Court's recent opinion in *Will* v. *United States,* 389 U.S. 90 (1967). Petitioner submits this reliance was misplaced. In the first place, the *Will* case does *not* hold that the writ cannot be used to review the disposition of a trial court's transfer ruling challenged for abuse of discretion. Secondly, footnote 6 in that case merely cautions the courts not "to be misled by labels such as 'abuse of discretion' *and 'want of power'* into interlocutory review of nonappealable orders. . . ." 389 U.S. at 98 (emphasis added). Since this Court referred to *both* circumstances in footnote 6, the Second Circuit was completely unwarranted in dismissing only the "abuse of discretion" label as a mere gloss on the "really extraordinary causes" ruling. Finally, the actual holding in *Will* is that in a *criminal* case—where the accused is entitled to a speedy disposition of the charges against him, where there is a double-jeopardy prohibition and where the Government's right to appeal is limited to exceptional cases—the *Government* cannot by a writ of mandamus review a trial court's order requiring the Government to produce a list of persons to whom the defendant had made statements, where no showing has been made that the trial court had adopted a policy in deliberate disregard of the

criminal discovery rules so as to seriously disrupt the efficient administration of criminal justice.

To expand this narrow holding to civil cases where the writ is being used to review a trial court's disposition of a transfer motion challenged for abuse of discretion, was completely unwarranted. This is especially true in view of the following statement made by this Court in *Will:*

> We note in passing that *La Buy* and the other decisions of this Court approving the use of mandamus as a means of policing compliance with the procedural rules *were civil cases* [citing *Schlagenhauf* and other cases]. We have pointed out that the fact that this case involves a criminal prosecution has contextual relevance. 389 U.S. at 98 n. 10. (emphasis added).

And in *La Buy* v. *Howes Leather Co.,* 352 U.S. 249 (1957), this Court said:

> We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here. 352 U.S. at 259.

Petitioner submits that by refusing to rule on petitioner's allegations that respondent had abused his discretion in denying transfer of these cases, the court of appeals abdicated its duty of supervisory control set down by this Court in *La Buy.* Furthermore, the Second Circuit's holding that the writ can be used only in "usurpation of power" cases is in direct conflict with this Court's decisions in *Bankers Life, supra,* and

Schlagenhauf, supra. Because of the extreme importance of this issue to the entire federal judicial system this Court should now grant certiorari and vacate the ruling of the court of appeals.

III. The Second Circuit's Ruling That This Was Not an Appropriate Case for the Use of Mandamus Was Erroneous and Has Detrimental Consequences for the Federal Court System in This and Future Multidistrict Litigation.

After holding that the All Writs Statute could be used only in "usurpation of power" cases, and that mandamus would issue only in "really extraordinary causes," the court of appeals went on to find that the present case was not an extraordinary cause. It said:

> There is nothing "really extraordinary" about this cause. Nor are there any "extraordinary circumstances." Whenever there is an airplane crash and a considerable number of persons are killed or injured, it is more or less inevitable that actions for recovery of damages will be brought by the survivors and by the representatives of those who lost their lives, and each will seek a state or federal forum convenient to him *and one where he thinks his recovery will be as large as possible.* It is also more or less inevitable, depending upon the circumstances of particular plaintiffs, their places of residence and the applicability of state laws, that some of the cases will be transferred, if all are pending in federal courts, to the court functioning in the place where the crash occurred. By the same token some of the applications for transfer will be denied. That is what has happened here. This state of affairs is not even unusual let alone "really extraordinary." 385 F.2d at 938 (emphasis added).

Petitioner submits that this finding was erroneous and that the error has detrimental consequences for the

federal court system in this and future multidistrict litigation. It was error for the court of appeals to use a "usual-unusual" standard when determining whether this was an appropriate case for the use of the writ. Mass disaster aviation crash cases are by their very nature "unusual" when compared to other types of litigation. Like antitrust cases and other protracted litigation, they present special problems for the courts.[4] It was also error for the court of appeals to find that this was an ordinary aviation crash case. Crashes of commercial airliners rarely result in so many cases being brought in so many different jurisdictions, a consequence here caused by the fact that the passengers on board petitioner's airplane were soldiers from all over the nation. This then, was an ideal case for the use of Section 1404(a), and but for that section and the wisdom of five United States District Judges, the federal court system would have been faced with a protracted trial arising out of this crash in each of the following places: Oklahoma, New York, Chicago, Philadelphia, San Francisco, Los Angeles, Little Rock, Arkansas, and Columbia, South Carolina. In addition, in this case the great majority of plaintiffs whose cases were before respondent upon petitioner's motion to transfer were residents of states other than New York. These plaintiffs had filed their actions in New York solely for the purpose of trying to obtain larger verdicts than they thought they could obtain in their home states. Added to this is the fact that petitioner here offered to

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[4] The problems presented to the federal courts by the electrical equipment antitrust cases of the 1960's were so great that they resulted in the introduction of a bill in Congress concerning transfer of cases in multidistrict litigation. See S. 159, 90th Cong., 1st Sess. (1967).

pay the travel expenses of these forum-shoppers, their witnesses and counsel to the transferee district for trial. Finally, transfer of the New York cases in this instance would have assured that the federal court system would have had to deal with only *one* trial on the issue of liability arising out of this crash. This fact was doubly important to petitioner because of the large claims for punitive damages being made by the plaintiffs in these cases. Shortly before its ruling in this case the Second Circuit stated in *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 836, 839 (2d Cir. 1967), "We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." Here petitioner, threatened with "overkill" by claims for punitive damages in many jurisdictions, presented respondent with a plausible solution to this problem by its motion to transfer.

In light of all these facts respondent's denial of the transfer motion was a clear abuse of discretion, and the circumstances of this case made it an appropriate one for the use of mandamus by the court of appeals. Its error in finding this to be an "ordinary" case has detrimental consequences for the federal court system, not only in this case, but in all future aviation disaster cases and other multidistrict litigation.

Because of the liberal federal venue statutes, and because of many recent state court decisions concerning when a corporation is "doing business" for purposes of service of process, plaintiffs can now sue airlines in virtually any state in the Union, regardless of where the cause of action arises. In addition, it is also a known fact that many claimants file their actions in large metropolitan areas like New York City, on the

theory that any judgment entered in their favor will be much larger than one recovered in a rural area. Contrary to many past decisions in which this practice was deplored by the courts,[5] the Second Circuit in its opinion in this case now openly sanctions such forum shopping. After *Farrell* it is only necessary for nonresident claimants to join their claims with the claims of a New York citizen to withstand a motion to transfer in the Second Circuit. This is a bad enough situation in an aviation case involving 92 passengers from 25 states and two foreign countries. As a rule for the future, it is intolerable. In just a few years commercial airliners will carry 500 passengers. In its zeal to avoid dealing with petitions for mandamus seeking review of transfer rulings, the Second Circuit openly invites the vast majority of this future litigation into the nation's busiest district courts.[6] Meanwhile, other district courts located in the judicial district where the crash occurred, or where the majority of the witnesses reside, will be faced with duplicate trials arising out of the same accident.

It seems beyond question that the Second Circuit's holding in this case has very detrimental consequences for the federal court system in this type of multidistrict litigation. Petitioner submits that the rule an-

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[5] See, e.g., *H. L. Green Co.* v. *MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963) ("We have no sympathy with shopping around for forums"); *Polaroid Corp.* v. *Casselman*, 213 F. Supp. 379 (S.D.N.Y. 1962); *Glenn* v. *Trans World Airlines, Inc.*, 210 F. Supp. 31 (E.D.N.Y. 1962).

[6] As of June 30, 1967, there were more civil actions pending in the Southern District of New York—a total of 10,527—than in any other judicial district in the United States. THE ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1966, p. 191.

nounced by the Second Circuit in this case is erroneous, and that the proper rule for such cases is the rule adopted by the Fourth Circuit in *General Tire & Rubber Co.* v. *Watkins, supra*—that a district court's order denying transfer will be overruled where efficient judicial administration in the federal court system requires that the case be transferred so that it can be consolidated with other cases arising out of the same occurrence. This Court should now grant certiorari to review and vacate the Second Circuit's erroneous holding on this important question.

IV. The Second Circuit's Sanction of Respondent's Misapplication of Van Dusen v. Barrack Emasculates Section 1404(a) for Purposes of Multidistrict Litigation.

In his opinion denying petitioner's motion to transfer these cases to Oklahoma for the purpose of a single consolidated trial on the issue of liability, respondent found that "the prospects of having a single *consolidated* trial in Oklahoma were, and are, highly speculative." 42 F.R.D. at 343, 344. Although respondent did not elaborate on this point, he cited as authority for this proposition the opinion of Judge Mishler of the Eastern District of New York in *Scaramuzzo* v. *American Flyers Airline Corp.*, 260 F.Supp. 746, 750, 752 (E.D.N.Y. 1966). The point made by Judge Mishler in *Scaramuzzo* was that the rule promulgated by this Court in *Van Dusen* v. *Barrack*, 376 U.S. 612, 634 (1964)—that in a transferred case "the transferee forum [is] obligated to apply the state law that would have been applied if there had been no change of venue"—may serve to render consolidation of these cases in Oklahoma impossible. Judge Mishler chose the doctrine of *res ipsa loquitur* as illustrative,

stating that there was a difference between Oklahoma and New York law on this doctrine, and that this difference would require separate trials even in Oklahoma.

On a motion to reargue in *Scaramuzzo* it was pointed out by petitioner that a mere difference in the laws of the transferor and transferee districts was not enough to rule out transfer after *Van Dusen,* since such a reading of that case would virtually emasculate § 1404(a). Petitioner noted that this Court in *Van Dusen* had said only, "Whenever the law of the transferee State *significantly* differs from the transferor State . . . it becomes necessary to consider what bearing a change of venue, if accompanied by a change in state law, would have on the 'interest of justice.'" 376 U.S. at 625. Petitioner went on to point out that in *Popkin* v. *Eastern Air Lines, Inc.,* 253 F. Supp. 244 E.D. Pa. 1966), the district court had concluded that consolidation after transfer would be unlikely because the laws of the two concerned jurisdictions *did* differ significantly. That is, the district court in *Popkin* observed that the Massachusetts Wrongful Death Act was a penal-type statute containing a $20,000 limitation on damages, and the Pennsylvania Wrongful Death Act was a compensatory-type statute allowing unlimited damages. For this reason it thought that the Pennsylvania cases would probably not be consolidated after transfer with the Massachusetts cases.

Petitioner argued to Judge Mishler in *Scaramuzzo,* and to respondent in this case, that there were no "significant differences" in the laws of the transferor forums and the proposed transferee forum in the cases arising out of this crash. Specifically, petitioner argued that the law of Oklahoma and the law of New

York on the doctrine of *res ipsa loquitur* appeared nearly identical. Compare *Tillery* v. *Ellison,* 345 P.2d 434 (Okla. 1959) with *Zaninovich* v. *American Airlines, Inc.,* 271 N.Y.S. 2d 866 (App. Div. 1966). In his opinion on the motion to reargue in *Scaramuzzo* Judge Mishler said:

> This problem in the application of the doctrine of *res ipsa loquitur* was used only as illustrative of the multifarious problems that arise when actions pending in many different courtrooms are transferred to a single distant location Even if the doctrine of *res ipsa loquitur* would present no problems for a transferee court in this case, however, the discussion had on that principle of law, and the nuances of the doctrine discussed by the state court in *Zaninovich,* serve as examples of the difficulties that are sure to be encountered on other points of law by a transferee court. 260 F.Supp. at 752.

Thus, in the present case respondent found, in accordance in *Scaramuzzo,* that the principle announced by this Court in *Van Dusen* v. *Barrack, supra,* would render the prospects of a single consolidated trial in Oklahoma "highly speculative," and denied transfer. Respondent then went on to rule however, that the sixteen cases before him should be consolidated for a single trial in New York on the issue of liability. It is respondent's consolidation ruling which most graphically points up the clearly erroneous nature of his ruling concerning *Van Dusen.*

The problems of a New York trial judge will, of necessity, be very similar to the problems of the judge in the proposed transferee district on the trial of these cases. In New York the judge will, under the "Erie-

Guaranty" doctrine, apply the law of New York—including New York's rules on choice of law—to all matters found to be "substantive" for *Erie* purposes. Such substantive matters include the duties and liabilities of the parties, compensatory damages, right to punitive damages, burden of proof, *res ipsa loquitur*, etc. See 1A Moore, FEDERAL PRACTICE ¶ 0.310, at p. 3401 *et seq.* (2d ed. 1953). As to each of these substantive *Erie* issues, found also by the New York judge to be "substantive" for conflicts purposes, the New York choice of law rules would apply. *Oltarsh* v. *Aetna Ins. Co.*, 15 N.Y.2d 111 (1964). New York holds that the applicable law is "the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issues raised in the litigation." *Babcock* v. *Jackson*, 12 N.Y.2d 473, 481, 240 N.Y.S.2d 743, 748 (1963); and see *Dym* v. *Gordon*, 16 N.Y.2d 120, 262 N.Y.S.2d 463 (1965). This rule is also applicable in wrongful death cases. *Long* v. *Pan American World Airways, Inc.*, 16 N.Y.2d 337, 266 N.Y.S.2d 513 (1965); and see *Gore* v. *Northeast Airlines, Inc.*, 373 F.2d 717 (2d Cir. 1967).

The sixteen cases before respondent involved plaintiffs, decedents, survivors, beneficiaries and a defendant from the following states: New York, Texas, Alabama, California, New Jersey, Connecticut, Vermont and Tennessee. Presumably, more jurisdictions, such as Oklahoma, could be "concerned" with some of the issues in this case. Therefore, the substantive law of all of these states will be involved in the trial of these actions in New York. Yet respondent found—and rightly so—that these sixteen cases could be consolidated for a single trial on the issue of liability. "Any

problems occasioned," he noted, "could be obviated easily by recourse to the procedures available under Fed. R. Civ. P. 49". 42 F.R.D. at 342. If a New York judge is able to obviate the complexities occasioned by *Babcock* v. *Jackson,* why should not an Oklahoma judge be able to cope with those occasioned by *Van Dusen* v. *Barrack*? The additional problems concerning procedural issues which the Oklahoma judge will encounter can also be obviated by use of the Federal Rules of Civil Procedures.

Therefore, respondent's own ruling consolidating sixteen cases for trial in New York is the best reason why his ruling that a consolidated trial in Oklahoma is "highly speculative" is clearly erroneous. By sanctioning the district court's misapplication of *Van Dusen* v. *Barrack, supra,* the Second Circuit has rendered an opinion which seriously erodes the effectiveness of Section 1404(a). With the word "significant" excised from *Van Dusen* the result is as follows: district courts will refuse to transfer cases to other districts where they can be consolidated with other actions arising out of the same occurrence upon a mere showing that the laws of the transferor and transferee forums are "different." Since that is true to some degree in *every* case, the result is a virtual emasculation of Section 1404(a) in the area where it is needed most—multidistrict litigation.

To prevent this emasculation of one of the most important and widely-used sections of the judicial code, this Court should grant certiorari and vacate the Second Circuit's opinion in this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Washington, D. C. 20006
Counsel for Petitioner

AUSTIN P. MAGNER
J. PATRICK HICKEY
Of Counsel

February 20, 1968.

APPENDIX A

The All Writs Act, 28 U.S.C. § 1651, provides in pertinent part:

> Section 1651(a). The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1404, provides in pertinent part:

> Section 1404(a). For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

67 Civ. 183

GEORGE E. FARRELL, as Administrator of the Estate of RALPH D. JOHNSON, deceased

and

GENEVIEVE SANTANA, individually and as Administratrix of the Estate of VICTOR SANTANA, deceased,

and

JOHN GUGLIUZZA, individually and as Natural Guardian of RONALD GUGLIUZZA, an infant, over the age of fourteen years,

and

MARGARET MANNING, individually and as next friend and guardian of the Person and Estate of SAMUEL DON MANNING, a minor,

and

WILLIAM KAY MILLER, as Temporary Guardian of the Estate of DAVID THOMAS, a minor,

and

ROSALIO TOBIAS, JR.,

and

IRENE COMMUNE, individually and as Administratrix of the Estate of ROBERT E. COMMUNE, deceased,

and

LORENZO GOMEZ, individually and as Temporary Administrator of the Estate of LUIS A. GOMEZ, deceased,

and

LORRAINE M. THOMAS, individually and as Administratrix of the Estate of DENNIS WISSELL, deceased,

and

JACK PASTER, individually and as Administrator of the Estate of RICHARD PASTER, deceased, *Plaintiffs*,

v.

AMERICAN FLYERS AIRLINE CORPORATION, *Defendant*.

67 Civ. 1630

WILLIAM MCGUIGAN, as Administrator of the Goods and Chattels, Rights and Credits of ROBERT F. MCGUIGAN, deceased, WILLIAM W. BART, as Administrator of the Goods and Chattels, Rights and Credits of WILLIAM RICHART BART, deceased, and LEO RAY BURNETT, SR., as Administrator of the Estate of LEO RAY BURNETT, JR., deceased, *Plaintiffs*,

v.

AMERICAN FLYERS AIRLINE CORPORATION, *Defendant*.

67 Civ. 302

WILLIAM P. KENNELLY and DOROTHY KENNELLY, as Administrators of the Goods, Chattels and Credits of WILLIAM T. KENNELLY, deceased, *Plaintiffs*,

v.

AMERICAN FLYERS AIRLINE CORPORATION, *Defendant*.

66 Civ. 2291

HELEN M. SCHMIDT, as Administratrix of the Goods, Chattels and Credits of RICHARD A. SCHMIDT, deceased, *Plaintiff*,

v.

AMERICAN FLYERS AIRLINE CORPORATION, *Defendant*.

67 Civ. 1562

DOROTHY WILLS, as Administratrix of the Goods, Chattels and Credits of LEMUEL WILLS, JR., deceased, *Plaintiff*,

v.

AMERICAN FLYERS AIRLINE CORPORATION, *Defendant*.

67 Civ. 1772

ELIZABETH HOLT DAVIDSON, individually and as Parent and Natural Guardian of BARRY W. HOLT, an infant, deceased, *Plaintiff*,

v.

AMERICAN FLYERS AIRLINE CORPORATION, *Defendant*.

McGOHEY, D. J.

The defendant moved under Fed. R. Civ. P. 42(a) to consolidate all of the above actions, and further moved, pursuant to 28 U.S.C. § 1404(a) to transfer them to the Eastern District of Oklahoma where they might have been brought since the defendant is doing business there.[1]

All of the actions arise out of a crash of one of the defendant's airplanes on April 22, 1966, near Ardmore, Oklahoma. The plane, under military charter, was carrying ninety-two soldiers and six employees of defendant. Only fifteen soldiers survived the crash. The plaintiffs are either survivors, guardians of survivors or administrators of the estates of deceased soldier-passengers.

In urging consolidation the defendant alleges, in the language of the Rule, that there are common questions of law or fact on the issue of liability. This can hardly be denied. Defendant's answers in all of the actions contain only a general denial and an "Act of God" defense. There is no claim that any plaintiff was contributorily negligent.

Two arguments are urged in opposition to the motion. It is asserted that while most plaintiffs allege negligence in the operation, maintenance and/or ownership of the air-

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[1] 28 U.S.C. § 1391(c).

plane, some have alleged only operational negligence. Plaintiffs urge denial of the motion because of this difference in legal theories. Any problems occasioned by this difference, however, could be obviated easily by recourse to the procedures available under Fed. R. Civ. P. 49.[2] Plaintiffs next contend that the motion for consolidation is an attempt to contravene an order denying the requested assignment of a Rule 2 Judge in the Farrell, Schmidt and Kennelly actions. Rule 2 of the General Rules of the Southern District of New York provides, in part:

> "(b) The . . . chief judge . . . upon his own motion or the motion of any party, may assign a long and complicated case to a judge for all purposes including the following: (1) to hear all motions and preliminary applications; (2) to conduct the pre-trial conference; and (3) to preside at the trial of the action."

The grant of a motion to consolidate would clearly not contravene that order. The motion for a consolidated trial, limited to the issue of liability, is granted.[3]

The next motion, to transfer these actions to the Eastern District of Oklahoma, is not the first such motion made by the defendant in an action arising out of this crash.[4] Two

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[2] Fed. R. Civ. P. 49 provides for special verdicts and for general verdicts accompanied by answers to interrogatories.

[3] Rando v. Luckenbach S.S. Co., 155 F. Supp. 220 (E.D.N.Y. 1957).

[4] Motions to transfer to the Eastern District of Oklahoma were granted in the following actions:

> Lara v. American Flyers Airline Corp., 66 Civ. 1308, N.D. Ill., Dec. 8, 1966; Turner v. American Flyers Airline Corp., 66 Civ. 1309, N.D. Ill., Dec. 8, 1966; Dawkins v. American Flyers Airline Corp., 66 Civ. 2165, N.D. Ill., Dec. 8, 1966, Wright v. American Flyers Airline Corp., Civ. Nos 66-

of the prior motions were denied by judges in this circuit: Schmidt v. American Flyers Airline Corp.,[5] and Scaramuzzo v. American Flyers Airline Corp.,[6] on facts not substantially different from those presented here.[7] Defendant urges, however, that two significant facts serve to distinguish the instant motion from the prior motions. The first is the increased number of cases now pending in the proposed transferee district. At the time of the prior motions only one action was pending there. To date, in addition to the fifteen actions pending in the Southern District of New York, there are nine actions pending in

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553, 66-554, D.S.C., Feb. 14, 1967; Helton v. American Flyers Airline Corp., Civ. No. 66-687, D.S.C., Feb. 14, 1967.

The opinions in the above motions are all annexed to the Bostwick affidavit in support of this motion.

Both the Illinois court and the South Carolina court noted that under their respective state's conflict of laws rule, the law of Oklahoma would control on the question of liability. This is not necessarily the law of New York. Dym v. Gordon, 16 N.Y. 2d 120, 209 N.E. 2d 792, 262 N.Y.S. 2d 463 (1965); Babcock v. Jackson, 12 N.Y. 2d 473, 191 N.E. 2d 279, 240 N.Y.S. 2d 743 (1963); Kilberg v. Northeast Airlines, Inc., 9 N.Y. 2d 34, 172 N.E. 2d 526, 211 N.Y.S. 2d 133 (1961).

[5] 260 F. Supp. 813 (S.D.N.Y. 1966).

[6] 260 F. Supp. 746 (E.D.N.Y. 1966).

[7] Defendant urges that at present, to facilitate the proposed transfer, it is offering to pay the costs of transporting plaintiffs, their counsel and witnesses to Oklahoma. This offer was presented during reargument of the Scaramuzzo motion. Despite this offer the motion was denied. 260 F. Supp. at 752. The precis of testimony expected to be elicited from defendant's proposed witnesses does not materially differ from that presented to the courts in support of the other two motions. This expected testimony, set forth on the issue of convenience of the witnesses, is considered no more compelling now than it was then.

In passing, it should be noted that both the Schmidt and Scaramuzzo cases have been settled and, therefore, plaintiff's arguments in opposition, to the effect that the present motion should be treated as a reargument of those motions and, as such, is untimely and improper, have not been considered.

the proposed transferee district; one action pending in the Eastern District of New York; one in the Eastern District of Arkansas; two in the Northern District of California; and one in the Central District of California.[8]

The courts in Schmidt and Scaramuzzo rejected arguments predicated on this, then hypothetical, situation. Those courts noted that even if all actions were transferred, the Oklahoma court would still have to research and decide questions of New York law, and that the prospects of having a single *consolidated* trial in Oklahoma were, and are, highly speculative.[9] This reasoning applies equally to the present motion. It should be noted further that the defendant has not demonstrated why the increased number of cases in the proposed transferee district compels a transfer "for the convenience of parties and witnesses" or "in the interest of justice." In fact, it appears that a transfer would do nothing more than shift the inconvenience from defendant to plaintiffs.[10]

The second factual distinction between the present motion and the prior motions to which defendant draws attention is that in both Schmidt and Scaramuzzo the plaintiffs were citizens of New York, whereas in the actions sought to be transferred by the instant motion some plaintiffs are not New York citizens. In light of the determination of the motion to consolidate, this argument carries little weight. Again, the reasons for denying the motions in Schmidt and

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[8] From the movant's affidavit, it appears that in all of the pending actions arising out of this crash, motions to transfer have been made or will be made in the near future.

[9] Schmidt v. American Flyers Airline Corp., 260 F. Supp. 813, 816-17 (S.D.N.Y. 1966); Scaramuzzo v. American Flyers Airline Corp., 260 F. Supp. 746, 750, 752 (E.D.N.Y. 1966).

[10] Schmidt v. American Flyers Airline Corp., supra note 9 at 815; Scaramuzzo v. American Flyers Airline Corp., supra note 9 at 751.

Scaramuzzo apply equally here and are, accordingly, adopted.[11]

The motion to transfer is denied.

Settle one order for both motions.

Dated: New York, N. Y., June 16, 1967.

JOHN F. X. McGOHEY
John F. X. McGohey
U. S. D. J.

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[11] Schmidt v. American Flyers Airline Corp., supra note 9 at 815: "The inconvenience of the . . . [local plaintiffs] outbalances the inconvenience of the ground observers, operations and medical witnesses [of defendant] . . ." Among the plaintiffs in the consolidate action, five are citizens of New York, two are citizens of New Jersey, and one is a citizen of Connecticut. From the affidavits it appears that defendant is not amenable to suit in either New Jersey or Connecticut, thus making New York a more convenient forum for these plaintiffs. The following conclusion of the court in Scaramuzzo is, therefore, relevant:

> "If the determination of this motion were to rest on the balancing of the convenience of the fact witnesses on the liability issue alone, the scales would not favor transfer; add to the weight against transfer, the inconvenience to the plaintiffs' witnesses on the issue of damages and the scales weigh heavily against transfer." Scaramuzzo v. American Flyers Airline Corp., supra note 9 at 749. The fact that all of the actions but one involving a New York survivor have been settled, does not alter the fact that the New York area survivors would still be witnesses on the question of liability. It should be additionally noted that none of the survivors are citizens of Oklahoma.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

September Term, 1967.

(Motion argued November 6, 1967
Decided November 22, 1967.)

Docket No. 31739

AMERICAN FLYERS AIRLINE CORPORATION,
Defendant-Petitioner,

v.

GEORGE E. FARRELL, as Administrator of the Estate of RALPH D. JOHNSON, deceased, *et al., Plaintiffs-Respondents.*

AMERICAN FLYERS AIRLINE CORPORATION,
Defendant-Petitioner,

v.

WILLIAM McGUIGAN, as Administrator of the Goods and Chattels, Rights and Credits of ROBERT G. McGUIGAN, deceased, WILLIAM W. BART, as Administrator of the Goods and Chattels, Rights and Credits of WILLIAM RICHARD BART, deceased, and LEO RAY BURNETT, SR., as Administrator of the Estate of LEO RAY BURNETT, JR., deceased, *Plaintiffs-Respondents.*

AMERICAN FLYERS AIRLINE CORPORATION,
Defendant-Petitioner,

v.

WILLIAM P. KENNELLY and DOROTHY KENNELLY, as Administrators of the Goods, Chattels and Credits of WILLIAM T. KENNELLY, deceased, *Plaintiffs-Respondents.*

AMERICAN FLYERS AIRLINE CORPORATION,
Defendant-Petitioner,

v.

DOROTHY WILLS, as Administratrix of the Goods, Chattels and Credits of LEMUEL WILLS, JR., deceased,
Plaintiff-Respondent.

AMERICAN FLYERS AIRLINE CORPORATION,
Defendant-Petitioner,

v.

ELIZABETH HOLT DAVIDSON, individually and as Parent and Natural Guardian of BARRY W. HOLT, an Infant, deceased, *Plaintiff-Respondent.*

AMERICAN FLYERS AIRLINE CORPORATION,
Defendant-Petitioner,

v.

HON. JOHN F. X. MCGOHEY, Judge of the United States District Court for the Southern District of New York,
Respondent.

Before: LUMBARD, *Chief Judge,*
MEDINA and HAYS, *Circuit Judges.*

Application for mandamus to review so much of an order of the United States District Court for the Southern District of New York as denies motions, under 28 U. S. C., Section 1404(a), to transfer the place of trial of five civil actions to the United States District Court for the Eastern District of Oklahoma, John F. X. McGohey, *Judge*. Opinion below reported at 42 F. R. D. 341. Petition denied.

MEDINA, *Circuit Judge:*

Judge McGohey having denied the motions of American Flyers Airline Corporation to transfer, pursuant to 28 U. S. C., Section 1404(a), several tort actions to the Eastern District of Oklahoma where an airplane crash occurred on April 22, 1966, we are urged to issue a writ of mandamus compelling the transfer. There is the usual aggregation of arguments supporting the contention that considerations of fairness and justice, the convenience of witnesses, stipulations for paying the expenses of transporting witnesses, and the requirements of sound judicial administration so far outweigh the reasons given by Judge McGohey for refusing to order the transfer as to make his ruling a "clear abuse of discretion." That Judge McGohey did exercise his discretion is abundantly plain. His opinion below is reported at 42 F. R. D. 341. Moreover, it cannot be doubted that we lack power under the All Writs statute, 28 U. S. C., Section 1651, to consider the pros and cons and issue the writ even if we should conclude that Judge McGohey's order was wrong and that we would have directed the transfer had the original application been addressed to us. The reason, as quoted from *De Beers Consol. Mines, Ltd.* v. *United States,* 325 U. S. 212, 217 (1945), by our brother Friendly in his concurring opinion in *A. Olinick & Sons* v. *Dempster Bros., Inc.,* 365 F. 2d 439, 446 (2 Cir. 1966), is that the All Writs statute cannot "be availed of to correct a mere error in the exercise of conceded judicial power," but can be used only "when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power."

The test is the one we announced as long ago as 1955 in *Torres* v. *Walsh*, 221 F. 2d 319 (2 Cir. 1955), *cert. denied*, 350 U. S. 836, citing a long line of Supreme Court cases to the effect that the writ may issue only "in really extraordinary causes."

What has brought down upon us this plague of ill-advised mandamus petitions in cases of transfer applications under 28 U. S. C., Section 1404(a), is the use, sometimes even in Supreme Court opinions, of the inherently ambiguous phrases "clear abuse of discretion," "clear cut abuse of discretion," and so on. The use of such misleading phrases is nothing short of an invitation to the defeated party, who seems always to be quite convinced that the judge is wrong, and who as often as not is also playing for delay, to apply for mandamus and give us a full scale review of every detail tending to support the transfer. Where it is evident as here that the Judge has exercised his discretion in a judicial manner, and that the case before us is not a "really extraordinary cause" we should summarily deny the petition for mandamus. In this connection it is worthy of note that this Court has never in its entire history granted one of these writs to compel a transfer.

That our conclusions as above stated are in accord with the view of the Supreme Court is made perfectly manifest by the reasons given by Chief Justice Warren for the vacation of a mandamus granted by the Seventh Circuit in *Hubert L. Will* v. *United States*, 389 U. S. 90, decided on November 13, 1967. Again and again is emphasis placed upon the "extraordinary" character of the writ. The very quotation from *Ex parte Fahey*, 332 U. S. 258, 260 (1947), we relied upon in *Torres* v. *Walsh, supra*, 221 F. 2d 319, 321, is repeated: "As extraordinary remedies, they (the Great Writs) are reserved for really extraordinary causes." That the occasional references in earlier opinions to the abuse of discretion were intended only as a gloss upon the

"really extraordinary causes" ruling is clear from the following quotation from footnote 6:

> Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power" into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. *Hubert L. Will* v. *United States, supra*, 389 U. S. 90, 98 (1967).

The ruling thus made was concurred in by the entire court, except that Mr. Justice Marshall did not participate. The concurring opinion of Mr. Justice Black, however, used the slightly different phrase "where there are extraordinary circumstances."

There is nothing "really extraordinary" about this cause. Nor are there any "extraordinary circumstances." Whenever there is an airplane crash and a considerable number of persons are killed or injured, it is more or less inevitable that actions for recovery of damages will be brought by the survivors and by the representatives of those who lost their lives, and each will seek a state or federal forum convenient to him and one where he thinks his recovery will be as large as possible. It is also more or less inevitable, depending upon the circumstances of particular plaintiffs, their places of residence and the applicability of state laws, that some of the cases will be transferred, if all are pending in federal courts, to the court functioning in the place where the crash occurred. By the same token some of the applications for transfer will be denied. That is what has happened here. This state of affairs is not even unusual let alone "really extraordinary." As transfer motions are always addressed to the discretion of the court, it need not surprise anyone that the discretion is sometimes exercised in favor of granting the transfer and sometimes not.

Moreover, this is clearly not a case of judicial intransigence or persistent flouting of the Rules.

Petition for mandamus denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of November, one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HAROLD R. MEDINA,
HON. PAUL R. HAYS,
Circuit Judges.

AMERICAN FLYERS AIRLINE CORPORATION, *Petitioner,*

v.

HONORABLE JOHN F. X. MCGOHEY, Judge of the United States District Court for the Southern District of New York, *Respondent.*

A petition for a writ of mandamus having been filed herein by counsel for the petitioner and argument having been had thereon,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

/s/ A. DANIEL FUSARO
Clerk

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Office-Supreme Court, U.S.
FILED
MAR 22 1968
JOHN F. DAVIS, CLERK

No. 1137

AMERICAN FLYERS AIRLINE CORPORATION,
Petitioner,

v.

GEORGE E. FARRELL, as Administrator of the Estate of RALPH D. JOHNSON, deceased, and GENEVIEVE SANTANA, individually and as Administratrix of the Estate of VICTOR SANTANA, deceased, and JOHN GUGLIUZZA, individually and as Natural Guardian of RONALD GUGLIUZZA, an infant over the age of fourteen years, and MARGARET MANNING, individually and as next friend and guardian of the Person and Estate of SAMUEL DON MANNING, a minor, and WILLIAM KAY MILLER, as Temporary Guardian of the Estate of DAVID THOMAS, a minor, and ROSALIO TOBIAS, JR., and IRENE COMMUNE, individually and as Administratrix of the Estate of ROBERT E. COMMUNE, deceased, and LORENZO GOMEZ, individually and as Temporary Administrator of the Estate of LUIS A. GOMEZ, deceased, and LORRAINE M. THOMAS, individually and as Administratrix of the Estate of DENNIS WISSELL, deceased, and JACK PASTER, individually and as Administrator of the Estate of RICHARD PASTER, deceased,
Respondents.

AMERICAN FLYERS AIRLINE CORPORATION,
Petitioner,

v.

WILLIAM P. KENNELLY and DOROTHY KENNELLY, as Administrators of the Goods, Chattels and Credits of WILLIAM T. KENNELLY, deceased,
Respondents.

AMERICAN FLYERS AIRLINE CORPORATION,
Petitioner,

v.

DOROTHY WILLS, as Administratrix of the Goods, Chattels and Credits of LEMUEL WILLS, JR., deceased,
Respondent.

AMERICAN FLYERS AIRLINE CORPORATION,
Petitioner,

v.

HON. JOHN F. X. McGOHEY, Judge of the United States District Court for the Southern District of New York,
Respondent.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DANIEL DONNELLY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1137

AMERICAN FLYERS AIRLINE CORPORATION,

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v.

GEORGE E. FARRELL, as Administrator of the Estate of RALPH D. JOHNSON, deceased, and GENEVIEVE SANTANA, individually and as Administratrix of the Estate of VICTOR SANTANA, deceased, and JOHN GUGLIUZZA, individually and as Natural Guardian of RONALD GUGLIUZZA, an infant over the age of fourteen years, and MARGARET MANNING, individually and as next friend and guardian of the Person and Estate of SAMUEL DON MANNING, a minor, and WILLIAM KAY MILLER, as Temporary Guardian of the Estate of DAVID THOMAS, a minor, and ROSALIO TOBIAS, JR., and IRENE COMMUNE, individually and as Administratrix of the Estate of ROBERT E. COMMUNE, deceased, and LORENZO GOMEZ, individually and as Temporary Administrator of the Estate of LUIS A. GOMEZ, deceased, and LORRAINE M. THOMAS, individually and as Administratrix of the Estate of DENNIS WISSELL, deceased, and JACK PASTER, individually and as Administrator of the Estate of RICHARD PASTER, deceased,

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AMERICAN FLYERS AIRLINE CORPORATION,

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AMERICAN FLYERS AIRLINE CORPORATION,

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AMERICAN FLYERS AIRLINE CORPORATION,

Petitioner,

v.

HON. JOHN F. X. McGOHEY, Judge of the United States District Court for the Southern District of New York,

Respondent.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Questions Presented

1. Whether the Court of Appeals for the Second Circuit used an improper test in determining whether mandamus should issue?

2. Whether the District Court abused its discretion in denying petitioner's motion to transfer when petitioner failed to make a clear and indisputable showing of its right to transfer?

Statement

Petitioner American Flyers Airline Corporation has sought to have transferred from the Southern District of New York to the Eastern District of Oklahoma twelve actions* for compensatory and punitive damages for three survivors and nine decedents as a result of the crash of petitioner's aircraft on April 22, 1966 near Ardmore, Oklahoma.

Petitioner is a certificated Supplemental Air Carrier doing business "in a very considerable number of States in the United States" (Petition, p. 4)† including New York. At the time of the transfer motion it owned ten multi-engined aircraft; for the calendar year 1966 it accrued almost nine million dollars in sales revenue.

The aircraft which crashed was carrying 92 soldiers of whom 77 were killed and 15 survived. As of the time of petitioner's transfer motion before Judge McGohey, of the

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* At the time of petitioner's initial motion under 28 United States Code, § 1404(a) before Judge McGohey, District Court Judge for the Southern District of New York, there were fifteen cases pending in that district. Three of those cases have been settled.

† References to the petition for certiorari hereinafter will be referred to as "P". References to the appendix to the petition will be referred to as "P. A."

forty-eight unsettled cases, fifteen involved injured passengers or survivors of deceased passengers residing in the New York, New Jerey and Connecticut area. Only one of the forty-eight cases involved an Oklahoma resident.

At that time, in addition to the fiften actions pending in the Southern District of New York, there were nine actions pending in the proposed transferee district; one action pending in the Eastern District of New York; one in the Eastern District of Arkansas; two in the Northern District of California and one in the Central District of California. Of the nine cases pending in the proposed transferee district only one case had been started here.

Prior to petitioner's motion to transfer brought on before Judge McGohey, its motions to transfer had been denied by Judge Mishler twice in *Scaramuzzo* v. *American Flyers Airline Corp.*, 260 F. Supp. 746 (E.D.N.Y. 1966), and once by Judge MacMahon in *Schmidt* v. *American Flyers Airline Corp.*, 260 F. Supp. 813 (S.D.N.Y. 1966).*

Judge Mishler considered the factors urged by petitioner as reasons for transferring the case. He reasoned that:

> "If the determination of this motion were to rest on the balancing of the convenience of fact witnesses on the liability issue alone, the scales would not favor transfer; add to the weight against transfer, the inconvenience to the plaintiff's witnesses on the issue of damages and the scales weigh heavily against transfer." 260 F. Supp. at 749.

Judge Mishler denied the transfer motion on the further ground that petitioner's argument, that should the transfer

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* Both the *Scaramuzzo* and *Schmidt* cases were settled after the motions to transfer were denied. Judge McGohey in denying petitioner's motion to transfer said "the reasons for denying the motions in *Schmidt* and *Scaramuzzo* apply equally here and are, accordingly, adopted" (P. A. 16a-17a).

be granted, and should petitioner's subsequent application for consolidation also be granted "substantial savings in time and money at both the trial and pretrial states" would result, was "illusory". The Court reasoned, inter alia, that on the basis of experience with air crash cases in that district, "the amount of duplication and inconvenience normally encountered when there are separate trials in multi-plaintiff accident cases is often exaggerated" and there was "no assurance that the promise of a single trial can be realized." 260 F. Supp. at 750.

On reargument, Judge Mishler reiterated his prior reasoning that a New York Court would be more familiar with applicable New York law than would be an Oklahoma court and he rejected petitioner's offer to pay the costs of plaintiffs and their witnesses to travel to Oklahoma as an attempt "to shift the inconvenience of pending actions in the various jurisdictions on to the shoulders of various claimants." 260 F. Supp. 752.

In rejecting petitioner's similar motion in *Schmidt*, Judge MacMahon concluded after reviewing the facts that neither the parties' nor the witnesses' convenience would be served by transfer. He further concluded that the interest of justice did not warrant the transfer. He reasoned that should transfer be ordered in the *Schmidt* case, petitioner's hopes of having all actions against it consolidated into one action in the transferee district were dim in view of the little likelihood that all cases in all other districts would be transferred to the Eastern District of Oklahoma and in view of the necessity for separate damage trials.

Judge McGohey, in rejecting petitioner's third attempt to transfer, held that the reasons for denying the motions in *Schmidt* and *Scaramuzzo* "apply equally here and are, accordingly, adopted." (P. A. 7).

Thereafter, petitioner sought a writ of mandamus in the Court of Appeals for the Second Circuit to compel Judge

McGohey to order the transfer arguing that Judge McGohey had abused his discretion in failing to consider certain proper factors and had erroneously evaluated proper factors. The petition was denied by a unanimous court.

ARGUMENT

The Court of Appeals did not employ an improper standard when it refused to issue the writ of mandamus. There is no conflict among the circuits.

Petitioner contends the Second Circuit ruled that mandamus could issue "only where there has been usurpation of judicial power, and will not issue for abuse of discretion" and in so doing was in direct conflict with this Court's decisions in *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379 (1953) and *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964) (pp. 16-17).

Petitioner has misread the opinion of the second circuit. That court did not reject the abuse of discretion test; rather, it found the lower court had not abused its discretion.

> "Where it is evident as here that the Judge has exercised his discretion in a judicial manner, and that the case before us is not a 'really extraordinary cause' we should summarily deny the petition for mandamus." 385 F. 2d at 938.

Petitioner has sought to contort the circuit court's statement that "occasional references in earlier opinions to the abuse of discretion were intended only as a gloss upon the 'really extraordinary causes' ruling" into a rejection of abuse of discretion as a criterion in determining whether mandamus should issue. By this language the court was not discarding abuse of discretion as a test but was merely warning against the use of mandamus to evade the prohibi-

tion against interlocutory appeals of nonappealable orders. The Circuit Court, in fact, quoted this Court in *Will* v. *United States*, 389 U. S. 90 (1967), where this very warning was given:

> "'Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power" into interlocutory review of nonappealable orders on the mere ground that they may be erroneous.' *Hubert L. Will* v. *United States, supra*, 389 U. S. 90, 98 (1967)." (P. A. 12a.).

Petitioner, in contorting the language of the second circuit, has ignored the fact that the Supreme Court itself has viewed petitions for mandamus "as extraordinary remedies . . . reserved for really extraordinary causes." *Ex parte Fahey*, 332 U. S. 258, 260 (1947).

Petitioner further contends there is a conflict among the circuits as to when mandamus should issue in transfer cases. It argues that while the Third, Fourth, Fifth, Sixth, Seventh, Tenth and District of Columbia Circuits issue mandamus when the lower court has abused its discretion, the First, Second and Ninth Circuits are more restrictive (P. 11). This contention is not borne out by a reading of the cases. Contrary to petitioner's contention, the First Circuit in *Teixeira* v. *Goodyear Tire & Rubber Co.* (261 F. 2d 153 (1st Cir. 1958), and the Second Circuit in this case and in *A. Olinick & Sons* v. *Dempster Bros., Inc.* (365 F. 2d 439 (2d Cir. 1966)), have held mandamus will issue for an abuse of discretion in transfer cases. Furthermore, in *Hartley Pen Co.* v. *United States District Court* (287 F. 2d 324 (9th Cir. 1961)), the Ninth Circuit, on the authority of *Gulf Research & Dev. Co.* v. *Harrison*, 185 F. 2d 457 (9th Cir. 1950), cited by petitioner as representing the more restrictive view in that circuit (P. 11), issued mandamus where the lower Court had abused its discretion in granting pre-trial discovery. There appears, therefore, to be no conflict among the circuits. Moreover,

petitioner fails to cite even one case holding the writ should not issue for such an abuse.*

Petitioner relies heavily on *General Tire & Rubber Co.* v. *Watkins* (373 F. 2d 361 (4th Cir.) *cert. denied*, 87 S. Ct. 1031 (1967)), as "the most striking example of a view exactly opposite to the rule promulgated by the Second Circuit" (P. 12). The Court in *General Tire*, granted the writ of mandamus on a finding that the district court had abused its discretion and that there were "extraordinary circumstances."** Rather than being opposite to the rule promulgated by the Second Circuit, it is the same. The Second Circuit refused mandamus because "the Judge has exercised his discretion in a judicial manner" (P. A. 11a) and because "there is nothing 'really extraordinary' about this cause. Nor are there any 'extraordinary circumstances'" (P. A. 12a).

Lastly, petitioner claims that in denying transfer the Second Circuit abdicated its duty of supervisory control imposed on it by *LaBuy* v. *Howes Leather Co.* (352 U. S. 249 (1957)). The Second Circuit in denying the petition for mandamus said "This is clearly not a case of judicial intransigence or persistent flouting of the Rules" (P. A. 12a). This being the case, petitioner's reliance on *LaBuy* is misplaced in as much as this Court in *Will* v. *United States*, said "we have no quarrel with LaBuy, which is simply inapposite where there is no showing of a persistent disregard of the federal rules" (389 U. S. 90, fn. 14).

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* In *In re Josephson*, 218 F. 2d 174 (1st Cir. 1954), the Court, by way of *dicta*, said that mandamus would not issue against a lower court which refused to transfer. The reasoning of the First Circuit was that it could not review such refusal because the review would not preserve its appellate jurisdiction. In *Josephson*, however, the court did hold that abuse of discretion would warrant the issuance of mandamus where the lower court had improperly ordered transfer.

** Unlike the case before the Second Circuit, the Court of Appeals in *General Tire, supra*, was confronted with a situation where there would be trials in two districts each for at least nine months and the parties in the transferor district were also parties to the action in the transferee district.

The District Court did not abuse its discretion in denying petitioner's motion for transfer.

Petitioner has "the burden of showing that its right to issuance of the writ is 'clear and indisputable' ". *Bankers Life & Cas. Co.* v. *Holland,* 346 U. S. 379, 384 (1953); see, *Will* v. *United States,* 389 U. S. 90 (1967). For the District Court to have abused its discretion in denying petitioner's motion for transfer, its action must have been "without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination . . .". *Wong Wing Hang* v. *Immigration and Naturalization Service,* 360 F. 2d 715, 719 (2d Cir. 1966).

The Opinion of Judge McGohey denying petitioner's motion for transfer specifically adopts the rationale of the *Schmidt* and *Scaramuzzo* courts which, as indicated above, acted on transfer motions arising out of this same accident. The implication of petitioner's contention, therefore, is that three judges acted "without rational basis", "inexplicably departed from established policies" and their decisions "rested on an impermissible basis."

None of the plaintiffs in the actions now sought to be transferred resides in Oklahoma; nor does petitioner. Of the 48 unsettled cases as of the time of petitioner's motion, 15 involved injured passengers or survivors of deceased passengers who resided in the New York, New Jersey and Connecticut area. Only one involved an Oklahoma resident. Thus in terms of convenience to plaintiffs, their convenience is served by the action being brought in the Southern District of New York.

The fact that plaintiffs have instituted their action in New York is to be accorded substantial weight. *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501 (1946). Rather than accord it substantial weight, petitioner denigrates plaintiffs' choice as forum shopping. Rather than move to transfer the al-

loged forum shoppers to the forum of their residence (petitioner ignores the fact that five actions are by New York residents), petitioner moves to transfer the cases to Oklahoma where none of them reside. In so doing, petitioner is bathed in the spotlight of its own accusation. It is forum shopping for what it concedes in its petition is a lower verdict than plaintiffs would be entitled to in the forum of their choice.

Nor does petitioner's offer to pay the expenses of the plaintiffs for their proposed sojourn to Oklahoma transform the inconvenience of prosecuting their claim in Oklahoma into convenience.

There has been no "clear and indisputable" showing by petitioner that trial in New York would be more inconvenient. Judge Mishler said "in summary, the defendant in this application seeks to shift the inconvenience of pending actions in the various jurisdictions on to the shoulders of the various claimants." 260 F. Supp. at 752; and Judge MacMahon in *Schmidt* held that petitioner by carrying soldiers from state to state, accepted the inconvenience and expense of defending suits throughout the country.

Nor would transfer result in a single trial in Oklahoma as petitioner asserts. This is so because separate damage trials will be required for each case. Furthermore, the most important factual issues in this case will revolve around damages not liability. The cause of this accident was the coronary insufficiency suffered by the pilot, petitioner's president, incapaciting him from controlling the fatal aircraft. This heart condition had been known to him for 19 years. Thus the location of damage witnesses rather than liability witnesses is more material in the present circumstances. The convenience of the damage witnesses is best served by a trial of the present cases in New York rather than in Oklahoma.

In support of its petition for mandamus petitioner listed forty-four witnesses whom it maintained would have to

testify. Judge MacMahon in *Schmidt* held that the testimony of most of these same witnesses was cumulative and of an immaterial nature. He arrived at his conclusion on the basis of petitioner's description of what their testimony would be fortified by the fact that of the forty-four only ten testified at the Civil Aeronautics Board hearing investigating the accident. As to those witnesses who are its employees, Judge MacMahon reasoned "All of these witnesses are under defendant's control and can testify in New York, if defendant desires. We are not convinced that defendant would suffer oppressive or unusual expense or inconvenience in transporting its own employees to New York where it does business." 260 F. Supp. at 814.

Judge MacMahon found further that defendant made no showing that its records could not as easily be produced in New York as in Oklahoma.

In short, petitioner has failed to show that the district court abused its discretion or that this case or the circumstance surrounding it were so extraordinary as to justify the issuance of the writ of mandamu.

CONCLUSION

The petition for certiorari should in all respects be denied.

Respectfully submitted,

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Attorney for Respondents.

Of Counsel:
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ANDREW P. O'ROURKE,
DANIEL DONNELLY.